

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

C & D HUGHES, INC.

Case No. 7-CA-52169

and

EPIFANIO MENDEZ, an Individual

*Joseph Canfield, Esq.,*  
for the General Counsel.  
*Craig M. Stanley, Esq.*  
*(Butzel Long, Detroit, Michigan)*  
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan on January 26, 2010. Epifanio Mendez, an individual, filed the charge in this matter on June 16, 2009, alleging that he had been discharged on June 1, 2009 because of union and protected activity. The General Counsel issued a Complaint on August 5, 2009 alleging that Mendez's discharge violated Section 8(a)(3) and (1) of the Act.<sup>1</sup>

On November 10, 2009, the General Counsel issued an amended Complaint, which alleged in addition that in early July 2009, Don McKay, an agent of Respondent, interrogated employees about the subject of an unfair labor practice proceeding without providing those employees with the proper *Johnnie's Poultry* safeguards in violation of Section 8(a)(1) of the Act. At trial, Respondent admitted that the company, by McKay, had interrogated employees as alleged.<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

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<sup>1</sup> The Complaint characterizes the alleged violation as a "lay-off."

<sup>2</sup> ***Johnnie's Poultry*** specified the following safeguards:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

146 NLRB at 775.

## Findings of Fact

## I. Jurisdiction

5 Respondent, a corporation, is engaged in highway construction in the State of Michigan. In 2008, Respondent purchased and received goods and supplies valued in excess of \$50,000 at its Michigan worksites directly from places outside of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 355 of the Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

15 Respondent is a large unionized construction contractor, which has had harmonious relations with the Laborers Union throughout Michigan. David Hughes, Respondent's director of field operations, and husband of Respondent's owner, is a member of the Union.

20 The Charging Party, Epifanio Mendez, worked for Respondent for nine years. He is a member of Laborers Local 1191 in Detroit. In April 2009, Mendez was assigned to a crew led by foreman Don McKay. McKay's crew was working at a project in Leighton Township in western Michigan.

25 During the first full week of May 2009, McKay's crew was installing sewer pipe in a 25 foot deep trench. Mendez was the "top man," whose job it was to keep the equipment operators apprised of when they were digging close to a sewer lateral or other utility line. He was also responsible for preparing certain equipment for installation in the trench. Another task for which Mendez was responsible was insuring that the equipment operator did not pull the trench boxes beyond a certain point. He apparently did not do so and on or about May 7, the trench caved in when the trench boxes were moved.<sup>3</sup> Although nobody was injured, it took Respondent's crew several hours to dig out the caved-in material. Thus, Respondent was unable to perform any productive work during this period.<sup>4</sup>

35 David Hughes visited the Leighton jobsite later on the day of the trench collapse. He was very angry in part because Respondent was already losing money on the job. He blamed Mendez for the collapse of the trench. Hughes told Mendez that he had three choices; he could work one day without being paid for it, he could accept a two-week suspension or Hughes could fire him. Mendez chose to work one day for free, which he did on May 8, 2009.

40 Mendez apparently had second thoughts about working a day without pay and called Laborers Local 1191. An official at Local 1191 referred Mendez to Local 355, which has jurisdiction in western Michigan. Local 355's business manager, Alex Zurek, sent one of his business agents, Steve Rumsberg, to the Leighton jobsite. Rumsberg interviewed Mendez and reported back to Zurek.

45 On May 29, Zurek called Respondent's President, Cheryl Hughes. Zurek told Hughes that Respondent could not decline to pay Mendez for a day of work. Cheryl Hughes responded

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<sup>3</sup> Two trench boxes were stacked one on top of another due to the depth of this trench.

50 <sup>4</sup> It is not exactly clear as to which day of the week the accident occurred. However, it is clear that occurred between Tuesday, May 5 and Thursday, May 7.

by telling Zurek that if she had to pay Mendez for May 8, she would fire him as he had cost Respondent a lot of money.

In a second telephone call on May 29, Zurek told Cheryl Hughes that Respondent had to pay Mendez for the 8 hours he worked on May 8. Ms. Hughes repeated that she would fire Mendez. A day or two later, David Hughes called Zurek:

Dave told me to open up the agreement, take a look at that, said he didn't have to pay Epi, that he was going to, and that I was lucky that Cheryl was handling it because he would have fought me every way, and Dave said he should have fired his ass when I had the chance.

Tr. 41.

Zurek's testimony regarding his conversations with Cheryl and David Hughes is uncontradicted. Although Ms. Hughes attended the hearing in this matter on January 26, 2010, she did not testify. I therefore fully credit Zurek's testimony which belies the claims of Respondent's witnesses David Hughes and Don McKay that Respondent had decided to lay-off Mendez prior to Zurek's telephone conversations with Ms. Hughes on May 29. I find that Respondent fired Mendez as a result of Mendez's complaint to the Union, Zurek's call to Ms. Hughes and the Union's insistence that Respondent pay Mendez for the eight hours he worked on May 8.

### *Analysis*

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence. However, in the instant case, Respondent's motivation is established by direct evidence, Cheryl Hughes statements to Business Agent Zurek that Respondent would fire Epifanio Mendez as the result of the Union's insistence that Mendez be paid for his work on May 8.

Respondent does not argue that Mendez was not engaging in protected activity when he complained to the Union about working on May 8 for free. It merely argues that there is no connection between Mendez's discharge and his complaint to the Union.

Regardless, it clear that Mendez's call to the Union was protected and that he would not have been fired but for this complaint. Thus, I conclude that Respondent violated Section 8(a)(3) and (1) in discharging Mendez on June 1. As the Board stated in *Tillford Contractors*, 317 NLRB 68 (1995):

When an employee makes an attempt to enforce a collective bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act, *Interboro Contractors*, 157

NLRB 1295 (1966). An employee making such a complaint need not specifically refer to the collective-bargaining agreement. As long as the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. *Bechtel Power Corp.*, 277 NLRB 882, 884 (1985); *Roadway Express*, 217 NLRB 278, 279 (1975); *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984).

I infer that the complaint refers to a reasonably perceived violation of a collective bargaining agreement from the fact that Mendez called the Union as opposed to a government agency. Moreover, collective bargaining agreements typically cover wages for hours worked. The fact that the Union followed up on his complaint also suggests that Mendez was attempting to enforce a right guaranteed by a collective bargaining agreement even if there was also a similar right under state or federal law. Moreover, Business Representative Zurek's uncontradicted testimony establishes that Mendez's complaint pertained to a perceived contractual issue from the employer's point of view. When David Hughes called Zurek, he told Zurek "to open up the agreement, take a look at that, said he didn't have to pay Epi," Tr. 41.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Epifanio Mendez, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, C & D Hughes, Charlotte, Michigan, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging activity reasonably perceived to be the enforcement of a right contained in a collective bargaining agreement.

(b) Questioning employees about matters pertaining to an unfair labor practice charge without communicating to the employee the purpose of the questioning, assuring him or her that

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<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

no reprisal will take place, and obtaining his or her participation on a voluntary basis, and without assuring that the questioning will occur in a context free from employer hostility to union organization and is not itself coercive in nature.

5 (c) Questioning employees in a manner that exceeds the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

10 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

15 (a) Within 14 days from the date of the Board's Order, offer Epifanio Mendez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

20 (b) Make Epifanio Mendez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

25 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to Epifanio Mendez's unlawful discharge and within 3 days thereafter notify him in writing that this has been done and that his discharge will not be used against him in any way.

30 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35 (j) Within 14 days after service by the Region, post at its Charlotte, Michigan headquarters copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2009.

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50 <sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C., March 23, 2010.

Arthur J. Amchan  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for attempting to enforce a reasonably perceived violation of the rights accorded to you in a collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT question you about matters pertaining to an unfair labor practice charge without communicating to the you the purpose of the questioning, assuring you that no reprisal will take place, and obtaining your participation on a voluntary basis.

WE WILL NOT question you about unfair labor practice charges in a manner that exceeds the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning your subjective state of mind, or otherwise interfering with the statutory rights of employees.

WE WILL assure that any questioning of you pertaining to a pending unfair labor practice charge occurs in a context free from employer hostility to union organization and is not itself coercive in nature.

WE WILL, within 14 days from the date of this Order, offer Epifanio Mendez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Epifanio Mendez whole for any loss of earnings and other benefits resulting from his discharge and other discrimination, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Epifanio Mendez and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

C & D HUGHES, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

477 Michigan Avenue, Federal Building, Room 300

Detroit, Michigan 48226-2569

Hours: 8:15 a.m. to 4:45 p.m.

313-226-3200.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.